A.P.K.

22/9/03

HIGH COURT OF JUDICATURE, CHHATTISGARH AT BILASPUR

Writ Petition No. 2858 of 2003

PETITIONER: Suresh Prasad, S/o Late Shri Shivnandan Prasad, aged about 50 years, Occupation- A-4, Class Contractor, R/o Banaras Road, Ambikapur, District-Sarguja (C.G.).

-Versus-

RESPONDENTS:

1. The Executive Engineer, Public Works Department, Bridge Construction Division, Ambikapur, District-Sarguja (C.G.).
2. Superintending Engineer, Public Works Department, Bridge Construction Circle, Raigarh (C.G.).
3. Chief Engineer, Public Works Department, Bridge Construction Region, Raipur (C.G.).
4. The Secretary, Public Works Department, Government of Chhattisgarh, Mantralaya, Raipur (C.G.).

POST FOR ORDER ON 22nd SEPTEMBER, 2003

Sd/-
L.C. Bhadoo
Judge

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Shri Prashant Mishra, counsel for the petitioner.

Shri Sanjay K. Agarwal, Deputy Advocate General for the Respondent/State.

Before: Hon'ble Shri L.C. Bhadoo, J.

O R D E R

(Passed on 22nd September, 2003)

1. The petitioner has filed this writ petition under Article 227 of the Constitution of India challenging the order dated 4.9.2003 passed by the District Judge Sarguja (Ambikapur) in Civil Suit No. 5-A/2003 by which learned District Judge has rejected the application under section 80(2) of the C.P.C. and also rejected the application under Order 39 Rule 1 and 2 of the Civil Procedure

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application under Order 39 Rule 1 and 2 of the Civil Procedure Code, and further ordered that the plaint be returned to the petitioner for filing after expiry of two months period from the date of notice dated 18.7.2003 sent by the petitioner to the defendants.

2. The brief facts leading to filing of this writ petition are that the respondents herein issued a notice inviting tender for construction of bridge on Banas River at k.m. ½ Janakpur – Badwahi road on lump sum tender form-F. The petitioner submitted his tender, which was accepted being competitive at Rs. 1,48,51,000/- on 30th November, 2002 and the work order was also issued to the petitioner. An agreement was entered into between the parties. Petitioner also deposited Rs. 7,42,000/- as security deposit. As per the agreement bridge was to be constructed within 16 months excluding the rainy season and it was to be completed by 30th November 2004. Under the lump sum tender contract the entire responsibility of testing of soil, preparation of drawing, submission of estimate etc. was upon the petitioner/tenderer. The petitioner conducted the lay out on the spot on 20th November, 2002 and took steps for digging of bore in January, 2003. In consultation with the technical Advisor drawing design of general construction was prepared and sent to the department on 10th March, 2003 which was the prescribed procedure of lump sum tender. The map was handed over to the petitioner after approval by the department on 6th June 2003. However, the respondent No.1 issued a show cause notice on 19th May, 2003 even before approval of the drawing.

3. According to the petitioner he had taken all the steps for performance of the work under the contract with due diligence and

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with all promptitude with a view that if the petitioner would have been allowed to carry out the work he would be able to complete the work within the prescribed period. But the respondents cancelled the contract and started making process for inviting fresh tenders. Accordingly, the petitioner filed a civil suit for permanent injunction before the District Judge along with an application under section 80(2) of the C.P.C. and another application under Order 39 Rule 1 and 2.

4. The respondents issued N.I.T. on 18.7.2003 for inviting fresh tender which is Annexure P/6. The respondents/defendants submitted their reply to the applications of the petitioner and both the applications were rejected by the trial Court by the impugned order.
5. Notice of the petition was accepted by the respondents/State. Mr. Sanjay K. Agarwal, Deputy Advocate General appeared on behalf of the respondents/State he submitted that he is not filing reply to the petition as only legal question is involved in this writ petition therefore he will argue the matter.
6. Accordingly the matter was heard on admission.
7. In this petition the only question raised is about the validity of the order passed by the learned District Judge regarding rejection of the prayer of the petitioner made in the application under section 80(2) of the C.P.C.
8. I have heard learned counsel for the parties.
9. Learned counsel for the petitioner Mr. Mishra while drawing attention of this Court to the impugned order submitted that learned lower Court has not recorded any finding regarding the urgency involved in the matter and simply disallowed the

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application on the ground that the petitioner had already sent a notice to the respondents under section 80 C.P.C. on 18.7.2003 and thereafter on 31st July, 2003 he has presented the suit along with application under section 80(2) C.P.C. therefore both the things cannot go together. More over the application is not supported by any affidavit. He further argued that no finding about the urgency has been recorded, therefore this petition deserves to be allowed and the matter be sent back to the learned District Judge for disposing of the application in accordance with the provisions of sub-section (2) of Section 80 of the C.P.C.

10. Shri Mishra after placing reliance on the judgment of Kereral High Court in the case of T.V.Parangodan Vs. District Collector Trichur and others reported in A.I.R. 1989 Kerala 276 further submitted that even the formal order is not required, it can be inferred from the circumstances that the implied permission was already granted as the learned subordinate Court issued notice to the respondents, and in turn they had filed return, reply to the applications. Learned subordinate Court also heard on the application under Order 39 Rule 1 and 2 C.P.C. and disposed of that application, therefore in the circumstances the subordinate Court was not within its right to reject the application of the petitioner under sub-section (2) of Section 80 C.P.C.

11. On the other hand Mr. Sanjay K. Agarwal, Deputy Advocate General submitted that sub-section (2) of Section 80 makes it clear that suit can only be proceeded with after leave is granted by the Court. Therefore, granting of leave under sub-section (2) of the Section 80 is prerequisite for proceeding of the trial of the suit. He placed

reliance on the judgment of Allahabad High Court in the case of Himachal Steel Rerollers and Fabricators Vs. The Union of India & others reported in A.I.R. 1988 Allahabad, 191.

12. In this connection a perusal of relevant provision would be beneficial. Sub-section (1) of Section 80 lays down that "no suit (shall be instituted) against the Government or against any public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of ...". However, sub-section (2) of section 80 is exception to sub-section(1), which lays down that "A suit to obtain an urgent or immediate relief against the Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1)."

13. Therefore, as per the provisions of sub-section(2) of Section 80 of the C.P.C. for obtaining the leave of the Court it is imperative that the plaintiff has to show urgency for immediate relief and the Court can grant such leave only after satisfying that the matter involves

urgent and immediate relief against the Govt. and in case interim stay is required than that is permissible only after giving notice to the Govt.

14. The proviso to sub-section (2) of section 80 further lays down that if the Court is satisfied after hearing the parties that no urgent or immediate relief need be granted in the suit, the Court shall return the plaint for presentation to it after complying with the requirements of sub-section(1). This shows that the Court is required to issue notice to the defendant on the application and the plaint after satisfying that the matter involves urgency and immediate relief and as per proviso after hearing the parties if the Court reaches to the conclusion that no urgent or immediate relief need be granted then court should return the plaint i.e. even at the initial stage in order to satisfy itself the Court is required to look into the application and the plaint whether any urgency is involved and immediate relief is sought against the Govt. and after satisfaction the Court is required to issue notice and can hear both the parties whether case of the plaintiff meets the requirement of sub-section(2) of Section 80 or not and can pass the order after hearing the parties in a particular case.

15. In the case reported in A.I.R. 1988 Allahabad 191 it has been held that the suit has to be filed only with the leave of the Court, such leave must precede the institution of the suit. It is not possible to read into the language of above provision that a plaintiff can be permitted to obtain such leave even subsequent to the institution of the suit. The bar of notice under section 80(1) can be removed only when requisite leave of the court has been obtained before or at the

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most while filing the plaint for institution of the suit. Ultimately the Court held that since as per the provisions of sub-section (2) of Section 80 leave was not taken before or at the time of institution of the suit the appeal is liable to be dismissed and thus dismissed the appeal.

16. Whereas, in the matter reported in A.I.R. 1989 Kerala 276 the High Court has held that sub-section (2) of Section 80 does not prescribe any form or manner in which leave of the Court for institution of the suit without notice under sub-section(2) has to be granted. What it says is only "with the leave of the Court, without serving any notice as required by sub-section (1)". Leave need not be by a formal order. It can be implied also and could be gathered from what the Court does. Proceeding with the suit after the objection by considering any relief could be a visible manifestation of an implied leave can be granted. That cannot be withdrawn at the final stage of the suit for dismissing on the question of maintainability when the remedy is lost by lapse of time. In that case the matter proceeded and even the defendant appeared, he raised objection about the maintainability of the suit but the prayer of the plaintiff was not decided, the injunction was considered and the same was disallowed but the appellate Court allowed the injunction application and the injunction was granted and finally the suit was disposed of and then only the maintainability was considered and that too only on the hyper technical ground and not on the merits. The High Court said that in the circumstances it was implied that the leave could be granted and the Court also held that since no form has been prescribed even the prayer could be made in the suit itself and no

separate application is required. In such case the mode or form of request or grant is not material. What is material is only the substance whether there was a proper request and whether it was considered and granted. Request with grounds, if any, must be there and there need only be indications as to whether it is allowed or not, even though a reasoned order may be good and an application is also appreciable.

17. Therefore, in the light of the above judgments in my opinion the proper course under sub-section(2) of Section 80 C.P.C. for the plaintiff is that a proper prayer should be made in the plaint showing the urgency and immediate relief by the plaintiff as to what is the urgency and as to how the plaintiff needs the immediate relief. It should be properly and categorically mentioned in the plaint and the Court after satisfying itself can grant the leave. Even an application can also be filed along with the plaint for seeking the leave of the Court for dispensing with the requirement of sub-section (1) of Section 80 but in that application also the plaintiff is required to indicate the facts and circumstances showing urgency involved in the matter and also how the plaintiff is in need of the immediate relief. If the plaint or the application, as the case may be, lacks in particulars showing the urgency and immediate relief then the Court can reject the prayer and refuse the leave.

18. In this connection if we look into the provisions of sub-section (2) and the proviso thereof there are two stages when the question of grant of leave is to be considered by the Court. The first stage is that when the suit is filed. When the Court is required to look into the prayer of the plaintiff and satisfy itself as to whether prima facie

case is made out for granting the leave to proceed with the suit without notice under sub-section (1) of section 80 C.P.C. and in that case the Court will prima facie look into the plaint or application as the case may be, as to whether the plaintiff has been able to make out the case for urgency and immediate relief and the Court after satisfaction, is required to issue notice to the opposite parties. The second stage is that as per the proviso the defendant has a right to raise objection that no urgency is existing in the matter or immediate relief is not required and the Court can after hearing both the parties pass the order regarding granting or refusing the leave. But where the Court without passing any formal order granting leave issue notice to opposite party, written statement and objection regarding maintainability is filed by the opposite party and Court proceed with the trial of suit without deciding the question of maintainability under section 80 (2) C.P.C. then at the final stage of the suit question of maintainability cannot be decided i.e. suit cannot be thrown on this ground after lapse of long time as the rights of the plaintiff may be irreparably lost by lapse of time and in that case it can be treated the leave has been impliedly granted that is why that Court is required to first decide the question of leave under sub-section (2) of Section 80 of C.P.C.

19. Now, coming to the present case, the summons were issued to the respondents and the objection was raised about the maintainability of the suit by the defendants. A perusal of the plaint filed by the petitioner before the subordinate Court shows that in the plaint it is nowhere mentioned that what is the urgency, on account of the urgency or immediate relief it is not possible for the petitioner to

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send notice under section 80 of the C.P.C. nor any relief has been sought in the plaint dispensing with the requirement of sub-section (1) of Section 80 C.P.C. Even the perusal of the application shows that in para-2 of the application the fact of sending of the notice under section 80 C.P.C. on 18.7.2003 has been mentioned. In para-3 of the application simply it has been mentioned that looking to the urgent situation it will be reasonable to pass the order for exemption of the sending of the notice and if the exemption is not granted then the plaintiff will suffer irreparable loss and he will be denied of the natural justice. Even in this application the circumstances and facts leading to the urgency has not been mentioned and clearly spelled out namely as to how and what urgency is involved in the matter. Therefore this application also lacks in material particulars. It is relevant to mention that initially the plaintiff had sent a notice on 18.7.2003 to the respondents/defendants but on 31st July 2003 he filed the suit along with the application under sub-section (2) of Section 80 of C.P.C. as well.

20. The subordinate Court after considering the arguments of counsel for the parties rejected the application under Order 39 Rule 1 and 2 and application under sub-section (2) of Section 80 was also rejected.

21. Since the plaint does not contain any averment regarding seeking exemption from complying with the requirement of sub-section (1) of Section 80 and the application filed for exemption under sub-section (2) of Section 80 regarding exempting the plaintiff from sending notice as envisaged in sub-section(1) of Section 80, lacks in material particulars and does not reflect the facts and circumstances in

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which the urgency was involved and immediate relief was required, more over in the matter first notice under sub-section (1) of Section 80 C.P.C. was sent and before the expiry of notice period suit was filed, therefore the application of the plaintiff was rightly rejected by the trial Court.

22. In the result, the petition has no force; it is liable to be and is dismissed at the admission stage itself.

Sd/-
L.C. Bhadoo
Judge

Thakur